KANCILTEK (M) SDN BHD

v.

MAYBAN FINANCE BHD (NO 1)

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[ORIGINATING MOTION NO: 25-8-2000]
29 SEPTEMBER 2000

CIVIL PROCEDURE: *Mode of commencement - Application form relating to third party charge - Whether mode of commencement by way of originating motion is the proper mode - Order 5 r. 5 Rules of the High Court 1980 - Whether complied - Banking and Financial Institutions Act 1989 - Whether authorises applicant to commence proceedings by originating motion - Whether court has discretion to treat non-compliance of O. 5 r. 5 as an irregularity*

The question for determination in this application is whether the mode of commencement by way of originating motion by the applicant for the production of the application form relating to a third party charge is the proper mode. In the application at hand, the applicant referred to the secrecy provisions in Part 13 of the Banking and Financial Institutions Act 1989 and contended that the secrecy provisions do not apply to an application for documents made by a landowner, as in this instant case, in respect of a third party charge in favour of a customer, and by reason thereof the respondent is not restricted to release and the applicant is entitled to apply for the document in question.

The respondent who raised the issue pursuant to a preliminary objection, contended that the commencement by way of originating motion is wrong owing to the non-fulfillment and non-compliance of the requisites as prescribed by O. 5 r. 5 of the Rules of the High Court 1980.

The respondents adverted to three main grounds in objection, *ie*; i) proceeding by way of originating motion is only permissible if authorised by Rules of the High Court or any written law; ii) there must be explicit intitulement of the relevant statute or rules either in the heading or body of the originating process and the grounds of the application must be stated in the originating motion; iii) there must be cause of action.

The applicant rebutted the respondent's allegations contending that the court has a discretion to treat the non-compliance of O. 5 r. 5 as an irregularity. The applicant further contended that the respondent had waived its right to object by reason of its unconditional appearance filed on 29 March 2000.

Held:

[1] From the reading of O. 5 r. 5 of Rules of the High Court 1980 ("RHC"), it is construed that the originating motion is only to be used when required or authorised by the RHC or by or under any written law *ie* where expressly required under any legislation.

[1b] Upon careful perusal of the provisions of the Banking and Financial Institutions Act 1989, reveals that it does not provide or authorise the applicant to commence the proceedings by originating motion.

[2] The court is inclined to agree with the finding in *Cheow Chew Khoon v. Abdul Johari Abdul Rahman* where it was stated that an originating process requiring an intitulement must state with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved, because if otherwise, a party may be able to shift from one rule to another or from one statute to another without any warning whatsoever to the opponent in court. This may make a mockery of the principle that there must be no surprise in civil litigation.

[3] Based on the wording of the claim of the applicant as prayed, it did not contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action. In this respect, the applicant does not and cannot disclose a cause of action against the respondent and as such, the originating motion cannot be sustained.

[4] The entry of unconditional appearance by the respondent cannot amount to a waiver for the simple reason that there is no necessity or requirement under the RHC to enter an appearance against an originating motion in the first place. Thus, the entry of appearance aforesaid cannot and does not amount to a waiver.

[5] Though the provisions of O. 2 RHC clearly stipulates that non-compliance of the Rules is to be treated as an irregularity, nevertheless the said order is not without exceptions. An irregularity under this rule may not be capable of being cured if the breaches of these Rules are fundamental.

[Preliminary objection upheld.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd [1993] 1 MLJ 283 ***(foll)***

Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(foll)***

Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v. Mary Lee & Ors [1999] 3 CLJ 143 ***(foll)***
Lee Phet Boon v. Hock Thai Finance Corp Bhd [1994] 3 CLJ 466 ***(refd)***
Pen Apparel Sdn. Bhd v. Leow Chooi Khon & Ors [1995] 4 CLJ 606 ***(refd)***

Legislation referred to:
Rules of the High Court, O. 2 r. 1(2), O. 5 rr. 1, 5, O. 12, O. 28 r. 8(1), O. 52 r. 3, O. 53 r. 2, O. 55 r. 13, O. 69 r. 2, O. 88 r. 3

For the applicant - YY Wu; M/s Wu & Co
For the respondent - Mohd Haaziq; M/s JS Pillay & Mohd Haaziq

Reported by Raja Vishnu

JUDGMENT

Syed Ahmad Helmy JC:

The question for determination in this application is whether the mode of commencement by way of originating motion by the applicant for the production of the application form relating to the third party charge is the proper mode.

The question arose from the preliminary objection raised by the respondent who contended that the commencement of the action by way of originating motion is wrong owing to the non-fulfillment and non-compliance of the requisites as prescribed by O. 5 r. 5 of the Rules of the High Court which Rules regulates the various modes of commencement of civil proceedings in the High Court.

The respondent's objection is based on three main grounds:

1. Proceedings by way of originating motion is only permissible if authorised by rules of the High Court or any written law.

2. There must be explicit intitulement of the relevant statute or rules either in the heading or body of the originating process and the grounds of the application must be stated in the originating motion.

3. There must be a cause of action.

The applicant in resisting the objection contended that the court has a discretion to treat the non-compliance of O. 5 r. 5 as an irregularity and in any event the respondent has waived their right to object by reason of their unconditional appearance filed on 29 March 2000.

I shall now address the issue by analysing the various applicable provisions of the Rules of the High Court 1980.

Order 5 r. 1 of the Rules of the High Court 1980 (RHC) reads as follows:

> Subject to the provisions of any written law and of these rules, civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition.

Order 5 r. 5 of the RHC states as follows:

> Proceedings may be begun by originating motion or petition if, but only if, by these rules or by or under any written law the proceedings in question are required or authorised to be so begun.

From a plain reading of the aforesaid rules it is evident that r. 1 is a restatement of the four modes available and recognisable for commencement of civil proceedings in the High Court while r. 5 specifically regulates proceedings relating to originating motion and petition in that it is only available if prescribed by the RHC or any written law.

The specific mention of the initiation of civil proceedings by way of originating motion in a specific rule to wit O. 5 r. 5 clearly reflects that it is a specie of civil proceeding which is different from writ or originating summons. The difference is further pronounced by the twin requirement of authorisation by the Rules or any written law as specified therein.

His Lordship Abdul Kadir Sulaiman J (as he then was) had occasion to construe the provision of O. 5 r. 5 of the RHC in *Lee Phet Boon v. Hock Thai Finance Corp Bhd* [1994] 3 CLJ 466 which was an application by way of originating motion to set aside an order for sale made under the provisions of the Sarawak Land Code and at para e at p. 469 his Lordship stated:

> Thus, from the said order, it is clear that originating motion is only to be used when required or authorised by the RHC or by or under any written law, which in this case is the Code. Perusing the RHC and the Code, I cannot find any specific rule or section which requires or authorises the Plaintiff to begin this nature of proceedings as contained in this application by originating motion. In fact, the Code does not at all prescribe the procedure for commencing an action of this nature.

and at para h of p. 469 he concluded:

> As mentioned earlier, originating motion not being the required or authorised mode, and the nature of the application is not one to be made by a petition, so what is left is the originating summons or a writ. Since the Plaintiff has chosen the originating summon procedure to commence the action, I have no

alternative but to agree with the submission of the learned counsel for the defendant and I accordingly allow the preliminary objection raised and hold that the Plaintiff has adopted the wrong procedure to bring his grievances before the court.

In the application at hand the applicant alluded to the Banking and Financial Institutions Act 1989 and in particular to the secrecy provisions in part 13 and contends that the secrecy provisions is not applicable to an application for documents made by a landowner (as in the instant case) in respect of a third party charge in favour of a customer, and by reason thereof the respondent is not restricted to release and the applicant is entitled to apply for the documents in question.

It is interesting to pause for a moment to note that though the Banking and Financial Institutions Act 1989 was invoked through submission made from the bar nevertheless the Act was never specifically alluded to or referred to in both the originating motion and the supporting affidavit of Wong Kai Wu in encl. 4 and on this score alone the applicant has failed to satisfy that his application falls within the ambit of O. 5 r. 5.

Be that as it may I have also carefully perused the provisions of Banking & Financial Institutions Act 1989 and nowhere does it provide or authorises the applicant to commence the proceedings in the manner in which it is commenced namely by originating motion.

It is also germane at this juncture that by virtue of the express requirement of O. 5 r. 5 the use of originating motion under the RHC is compulsory in the following circumstances:

(a) Under the rules

(i) appeals to the High Court from any decision of any person or body of persons: O. 55 r. 13.

(ii) applications (after leave has been obtained) for an order of *mandamus*, prohibition, or *certiorari*; see O. 53 r. 2.

(iii) Proceedings for the determination of a case stated or a question of law referred by way of case under any enactment, eg. from the decision of the Special Commissioners of Income Tax.

(iv) Some applications in arbitration proceedings, eg an application for a declaration that an award made by an arbitrator is not binding on the applicant: O. 69 r. 2.

(v) applications for an order for committal for contempt of court where there are no pending proceedings and after leave has been obtained: O. 52 r. 3.

(v) some applications under the Companies Act 1965 (Act 125), eg for rectification of the company register see O. 88 r. 3.

(vi) applications under the Trade Marks Act 1976 (Act 175).

(b) By or under any written law, ie, where expressly required under legislation.

On the second ground namely whether the wording of O. 5 r. 5 of the RHC imposes an obligation on the applicant to fulfill the requirement of an intitulement of the statute or rule of court under which the court is moved in either the heading or the body of the application, I am constrained to hold in favour of the respondent.

The strictures of the requirement and the rationale behind such an obligation was aptly put by his Lordship Gopal Sri Ram JCA in *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari Abdul Rahman* [1995] 4 CLJ 127 when considering an originating summons for recovery of vacant possession which failed to specify the specific rules under which it was instituted stated at p. 142:

> The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support, one would come to the conclusion that it is not an application made under O. 89. The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitulement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not.
>
> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. *It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved*: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

The application herein in the manner in which it was drafted gives rise to the question on whether it discloses a cause of action against the applicant herein. In *Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v. Mary Lee (as executrix of the Estate of Low Ai Lian) & Ors* [1999] 3 CLJ 143 the Court of Appeal affirmed that an originating summons – like a pleading in a statement of claim – must contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief is claimed.

His Lordship NH Chan JCA stated at paras. e to i at p. 149:

> So that an originating summons is just like a pleading in a statement of claim, it must contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief or remedy is claimed. In other words, an originating summons, like a statement of claim, must disclose a cause of action (*Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409). Therefore, if the summons itself, as in the instant case, does not disclose any cause of action, it can be dismissed: see *Saraswathy Devi a/p Nadchatiram v. Vijayalakshmi. Devi a/p Nadchatiram* [1998] 1 MLJ 89 at p. 96 which is a decision of this court. The words 'cause of action' have been defined by Diplock LJ in *Letang v. Cooper* [1965] 1 QB 232 at pp. 242-243 as meaning 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person'.
>
> Since the orders sought by the plaintiffs in the instant originating summons are not founded on any cause of action against the company, the originating summons should have been dismissed. The originating summons itself does not disclose any reasonable cause of action against the company.

Similarly in the case at hand I find that the claim of the applicant as prayed namely "respondent diarahkan untuk menyampaikan kepada pemohon dalam jangkamasa lapan hari dari tarikh perintah ini dikeluarkan suatu salinan yang diperakui sah oleh pihak Responden **borang permohonan pinjaman yang telah diserahkan oleh Melati Putih Sdn Bhd (penjamin)** kepada responden semasa permohonan untuk pinjaman berkala sebanyak RM1.7 juta ("pinjaman tersebut") ..." does not and cannot disclose a cause of action against the respondent and as such the originating motion cannot be sustained and must be dismissed.

Even if I am wrong on the question of cause of action nevertheless my findings in favour of the respondent on the two grounds aforesaid is sufficient affirmation of the merits of the applicant's preliminary objection.

The applicant on the face of the rigorous and credible objection sought to pursue a rescue operation over its application by strenuously urging the court to exercise its discretion by treating the objection as a mere irregularity and that the respondent by entering an unconditional appearance has waived whatever irregularity committed by the applicant.

I shall now divert my attention to the two grounds relied upon by the applicant to ascertain whether it would neutralise the respondent's objection herein.

I shall proceed by addressing the question of waiver, namely whether the entry of unconditional appearance by the respondent amounts to a waiver of the non-compliance by the applicant of O. 5 r. 5 RHC.

Under the Rules of the High Court 1980 the requirement of entry of appearance is regulated by O. 12 which lists out eight rules thereunder. It is interesting to note that the heading to the said O. 12 is prefaced by the words "entry of appearance to writ or originating summons". The heading itself provides an uncontroverted answer as to the type of civil proceedings which requires the entry of appearance.

Upon a careful analysis of all the eight rules of O. 12 I find that the requirement of entry of appearance under the RHC, is only confined to writ of summons and originating summons. Nowhere in the said order or any of its eight rules is there a requirement for entry of appearances for originating motions.

The question thus arise – whether an entry of unconditional appearance by the respondent herein when the provisions of entry of appearance in the Rules of the High Court does not extend to originating motions can amount to waiver on the part of the respondent. I must answer the question with an emphatic No. The entry of unconditional appearance by the respondent here cannot amount to a waiver for the simple reason that there is no necessity or requirement under the RHC to enter an appearance against an originating motion in the first place. Thus the entry of appearance aforesaid cannot and does not amount to a waiver and I so hold.

Turning to the other question raised by the applicant – namely that the court should exercise its discretion and treat the objection as a mere irregularity under O. 2 RHC the applicant relied on the case of *Pen Apparel Sdn. Bhd v. Leow Chooi Khon & Ors* [1995] 4 CLJ 606.

Though the provisions of O. 2 RHC clearly stipulates that non-compliance of the Rules is to be treated as in irregularity and not a nullity, nevertheless the said order is not without exceptions.

It is important in applying the provisions of O. 2 RHC, to have in the forefront of one's mind the trite law that if the non-compliance is so fundamental and serious the court should not shy away from its power to set aside the proceedings – either wholly or in part as conferred by O. 2 r. 1(2) of the RHC. The non-compliance of the Rules of the High Court 1980 though an irregularity under this Rule may not be capable of being cured if the breaches of these Rules are fundamental – *Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283.

In the context of the present case as the requirements of O. 5 r. 5 RHC relating to the express stipulation of the relevant rules of court or statute upon which the application is founded was not complied with by the applicant and the non-compliance is so fundamental the court's discretion cannot be moved in the applicant's favour and I accordingly decline to accede to the applicant's request. As was submitted by the respondent's counsel and for which I agree that the bottom line is – if there is no empowering provision either by statute or rules the application and by extension the prayers therein is incurably defective. The upshot of it all is to uphold the preliminary objection of the respondent herein.

Before concluding I would like to state that the *Pen Apparell*'s case cited by applicant's counsel clearly emphasise and reaffirms the approach to be taken by the court, namely even if the RHC confers discretionary powers of conversion to the court (like converting originating summons to writ action pursuant to O. 28 r. 8(1) RHC) nevertheless if the court declines to exercise its discretion, it should not be constrained from exercising its coercive powers of striking out.

In the circumstances, for the reasons stated above I hereby uphold the preliminary objection of the respondent and accordingly strike out the applicant's application in encl. 2 with costs.